No. 85-782

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

—v.—

LUZ MARINA CARDOZA-FONSECA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE LAWYERS COMMITTEE FOR HUMAN RIGHTS THE AMERICAN JEWISH COMMITTEE THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH INDIAN LAW RESOURCE CENTER GOVERNOR TONEY ANAYA

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INTEREST OF AMICI

Amici Curiae, the Lawyers Committee for Human Rights, the American Jewish Committee, the Anti-Defamation League of B'nai B'rith, the Indian Law Resource Center and Governor Toney Anaya, offer this brief in support of petitioner.

The Lawyers Committee for Human Rights ("LCHR") is a national legal resource center working in the areas of human rights, refugee and asylum law. In 1980, the Committee created a national asylum project to monitor proposed legislation and regulations in the refugee and asylum areas, litigate significant cases in these areas, and assist in providing legal representation for applicants for political asylum.

In the representation area, the LCHR's national asylum project uses volunteer lawyers to represent deserving asylum-seekers irrespective of their nationality. Aside from its program in New York City which provides assistance to over 150 individuals each year, including asylum applicants in detention, the LCHR project works nationally to encourage and support private bar involvement in the asylum area. Since 1982, this project has trained and provided practice materials to over 1,500 volunteer lawyers who represent indigent Haitian asylum applicants. See A. Helton, The Haitian Pro Bono Representation Effort, 12 Hum. Rts., Fall 1984, at 19. In recognition of the unique needs of asylum-seekers for

the effective assistance of counsel, and the interest of the private bar in meeting those needs, LCHR's asylum project is helping to organize and support volunteer lawyer programs to represent asylum applicants in Boston, New York, Miami, New Orleans, Houston and Los Angeles.

The American Jewish Committee, a national organization of approximately 50,000 members, is dedicated to the defense of the civil rights and religious liberties of American Jews. The Committee believes that it can best accomplish this goal by helping to preserve the human rights of all persons, regardless of race, religion or national origin. Since its founding in 1906, the Committee has maintained an abiding interest in the development

of generous immigration, refugee and asylum policies. Ever mindful of our inability during the 1930's to make our immigration laws more flexible and responsive in order to rescue people trapped in Europe when war broke out, many of whom later died in Hitler's death camps, the Committee is committed to the fundamental humanitarian principle that the United States should play a key role in providing, together with other free nations, a safe haven for the world's oppressed.

The Anti-Defamation League ("ADL") was organized in 1913 to advance goodwill and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The ADL is vi-

tally interested in protecting the civil rights of all persons and in assuring that every individual receives equal treatment under the law regardless of his or her race, religion or ethnic origins.

Since its inception in 1913, the ADL has espoused a principle against discrimination: "to secure justice and fair treatment for all." To that end, ADL has intervened in numerous landmark cases, urging the unconstitutionality or illegality of racial practices, e.g., Brown v. Board of Education, 374 U.S. 483 (1954); San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973); Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984).

In addition to the ADL's concern with combatting racial discrimination is its interest in assuring that immigration procedures adhere to basic standards of justice and fairness, including respect for due process and fundamental human rights, regardless of race, creed, ancestry or national origin. In support of these principles, the ADL recently filed as an amicus curiae in Jean v. Nelson, 105 S. Ct. 2992 (1985). These principles are again at issue in the present case.

The Indian Law Resource Center is a non-profit, charitable, legal and educational organization working to support the rights of American Indians. The Center is a non-governmental organization with consultative status in the United

Nations. The Center has worked on asylum and refugee policies and practices with international organizations such as the United Nations High Commissioner for Refugees, the International Committee of the Red Cross, and the Organization of American States' Inter-American Indian Institute. The Center's legal staff has also assisted Kanjobal Indians from Guatemala and Miskito Indians from Nicaragua who are seeking asylum in the United States.

An increasing part of the Center's program is devoted to work on behalf of Indians from Central and South America. In recent years, Indians from those regions have been victims of some of the most serious human rights abuses in the Americas.

As a result, several thousand Central American Indians are presently seeking refuge in the United States.

Indian asylum applicants are typically from remote rural areas and usually speak Indian languages. Very few are from the educated, urban sectors whose members are most able to provide clear documentation of the persecution from which they have fled. Accordingly, the Center supports efforts to establish reasonable legal standards which will provide Indian asylum applicants with a fair opportunity to establish their entitlement to protection.

On March 28, 1986, Toney Anaya, exercising the administrative powers available to him as the Governor of the State of New Mexico,

issued a proclamation declaring New Mexico to be a "State of Sanctuary." This decree is not a condonation of civil disobedience, but an exhortation to all, including the immigration authorities, that they must follow international and domestic refugee laws. This action followed passage by large margins in both houses of the New Mexico Legislature of memorials advocating changes in federal immigration policy towards Central Americans. Governor Anaya's proclamation made New Mexico the first state to join numerous American municipalities and other political subdivisions in declaring sanctuary.

Governor Anaya is an American of Spanish descent, whose forebears arrived in this land when

legal barriers to immigration were unknown. The federal standard for political asylum is of crucial to Governor Anaya because of New Mexico's location on the southern border, which thousands of Central American refugees cross to seek refuge in the United States. The interest of Toney Anaya as amicus curiae is to eliminate the need for the sanctuary movement by assuring that the administrative process whereby refugees seek asylum is a fair procedure where justice is meted out in accordance with national and international law.

The written consent of both parties to this case has been obtained for the filing of this brief.

SUMMARY OF ARGUMENT

The legislative history of the Refugee Act of 1980 indicates that Congress intended to adopt a generous standard for granting political asylum which would comport with the practical difficulties facing asylum applicants. Moreover, a liberal interpretation of the "well-founded fear of persecution" standard is compelled by the difficulties asylum-seekers typically face in obtaining evidence and developing a factual record sufficient to support their claims. (Part I). The laws and practice of other sovereign states party to the 1951 United Nations Convention and the 1967 Protocol relating to the Status of Refugees is not only relevant to this Court's interpretation of these

international agreements, but is also a useful and recognized guide in interpreting the United States domestic laws at issue in this case. (Part II.A). Finally, sovereign states other than the United States which are parties to the Convention and the Protocol apply a liberal standard in determining refugee status in their own countries in recognition of the difficulties inherent in proving asylum claims and the gravity and nature of the harm facing the applicants if the claims are wrongly denied. (Part II.B).

ARGUMENT

On August 12, 1985, the United States Court of Appeals for the Ninth Circuit held that the "well-founded fear of persecution" standard is applicable to political asylum applications. Cardoza-Fonseca v. INS, 767 F.2d 1448, 1452 (9th Cir. 1985), cert. granted, 106 S. Ct. 1181 (1986). The Court of Appeals thus found that the Board of Immigration Appeals had erred by applying the clear probability standard of proof to Respondent's asylum application, and remanded the asylum claim for consideration under the proper legal standard. 767 F.2d at 1455.

I.

A Generous Standard of Proof is Justified in View of the Inherent Difficulties Asylum-Seekers Face in Showing a "Well-Founded Fear of Persecution."

A generous standard for establishing eligibility for asylum is warranted in view of the myriad obstacles asylum-seekers and their counsel face in developing a documentary record demonstrating a "well-founded fear of persecution" within the meaning of section 208(a) of the Refugee Act of 1980.[1] The

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[1] Under § 208(a) of the Refugee Act of 1980, 8 U.S.C. § 1158(a) (1982) [hereinafter cited as the "Refugee Act"], an alien may be eligible for asylum if he or she meets the definition of "refugee" contained in § 101(a)(42)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (1982), which explicitly employs the "well-founded fear of persecution" standard.

clear intent of the Refugee Act was to address "the tragedy of countless men, women, and children forced to leave their homes . . . . [w]hether they be 'boat people' fleeing the upheavals in Indochina, refugees in Southern Africa fleeing racism or guerrilla war, or Soviet Jews and Eastern Europeans seeking the promise of Helsinki Accords . . . ." 125 Cong. Rec. 23,232 (1979) (statement of Sen. Kennedy). Congress was aware, when it declared that the purpose of liberalizing the Immigration and Nationality Act, 8 U.S.C. § 1101 (1982), was "to respond to the urgent needs of persons subject to persecution in their homelands," Refugee Act of 1980, Pub. L. No. 96-12, 94 Stat. 102 (1980), that the vast majority of asylum applicants

would be from diverse cultures, without a command of the English language and without the opportunity or resources to gather documentary evidence of persecution.[2]

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[2] The Refugee Act was intended to liberalize the Immigration and Nationality Act, 8 U.S.C. § 1101 (1982), and to establish an asylum policy which, for the first time, would "facilitat[e] the admission and resettlement of refugees." S. Rep. No. 256, 96th Cong., 1st Sess. 2 (1979). The Refugee Act sought to give "statutory meaning to our national commitment to human rights and humanitarian concerns not reflected in the Immigration and Nationality Act of 1952, as amended," S. Rep. No. 256, 96th Cong., 1st Sess. 1 (1979), and to "bring United States law into conformity with our international treaty obligations under the United Nations Protocol relating to the Status of Refugees, [19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (Jan. 31, 1967) (hereinafter cited as the "Protocol")] ratified in November 1968, and the United Nations Convention relating to the Status of Refugees [July 28, 1951, 189 U.N.T.S.

(Footnote continued)

Courts also have recognized that aliens fleeing persecution often are unable to gather documentary evidence to prove past persecution or threat of future persecution. See Cardoza-Fonseca v. INS, 767 F.2d 1448, 1453 (9th Cir. 1985), cert. granted, 106 S. Ct. 1181 (1986); Carvajal-Munoz v. INS, 743 F.2d 562, 574 (7th Cir. 1984). Indeed, many asylum applicants reach the United States physically and emotionally exhausted, with nothing more than the clothing they are wearing. See Jean v. Nelson, 711 F.2d 1455, 1507 (11th Cir. 1983),

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150 (hereinafter cited as the "Convention")] which is incorporated by reference into United States law through the Protocol." S. Rep. No. 256, 96th Cong., 1st Sess. 4 (1979).

aff'd en banc, 727 F.2d 957, aff'd, 105 S. Ct. 2992 (1985); Haitian Refugee Center v. Civiletti, 503 F. Supp. 442, 474-510 (S.D. Fla.), appeal dismissed, 614 F.2d 92 (5th Cir. 1980), modified sub nom. Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982).

The majority of asylum applicants can offer only their own testimony that there are specific, concrete reasons giving rise to their fear of persecution. Their persecutors are unlikely to accommodate them by providing documentary evidence of past or contemplated future persecution. Their counsel must, therefore, assemble evidence of general conditions in the country of origin to corroborate the asylum-seeker's testimony. Such evidence

is compiled by indigenous refugee groups in the United States and abroad, and by the United States Department of State, Amnesty International, United Nations High Commissioner for Refugees, Americas Watch Committee, Helsinki Watch Committee and others. Courts are receptive to this type of evidence. See, e.g., Haitian Refugee Center v. Smith, 676 F.2d 1023, 1042 (5th Cir. 1982) (indicating the relevance of evidence concerning general conditions); Civiletti, 503 F. Supp. at 475 ("No asylum claim can be examined without an understanding of the conditions in the applicant's homeland."); In re Exame, 18 I. & N. Dec. 303, 304-05 (BIA 1982) (immigration judge improperly excluded evidence including "various reports

by Amnesty International and the Lawyers Committee for International Human Rights, Country Reports on Human Rights Practices from the United States Department of State").

In addition to the problems of obtaining documents that support the applicant's claim, many asylum-seekers do not speak English and must communicate through interpreters, thus increasing the potential for misunderstanding as well as inhibiting the growth of trust between such applicants and their counsel. The courts have recognized the obstacles encountered by such applicants and their need for counsel to represent their interests. See Rios-Berrios v. INS, 776 F.2d 859, 862-63 (9th Cir. 1985). In Civiletti, 503 F. Supp.

at 486, the court noted the added difficulties in obtaining information from applicants when the interviewer has a totally dissimilar cultural background from the applicant. Even more alarming is the situation where the interpreter relays incorrect information. In Augustin v. Sava, 735 F.2d 32, 38 (2d Cir. 1984), the Second Circuit stated that if the asylum applicant had understood English, "he would have realized that his asylum application did not state his true claim." See also Jean v. Nelson, 711 F.2d at 1463 ("translators were so inadequate that Haitians could not understand the proceedings nor be informed of their rights"); Gonzales v. Zurbrick, 45 F.2d 934,

937 (6th Cir. 1930) (inadequate translation in deportation hearing).

Applicants also are frequently afraid to disclose sensitive information that could place them in jeopardy if they are returned home or that could jeopardize the safety of their families or friends who remain in the home country. The courts have recognized this obstacle. See Civiletti, 503 F. Supp. at 483 (noting that asylum-seekers might be "extremely cautious and suspicious" to protect themselves or others from reprisals in their homeland).

Asylum applicants who are able to corroborate their claims with independent documentary evidence are rare exceptions. A few cases drawn from the files of the

LCHR's asylum project illustrate the inordinate and unrealistic burden of documentary proof necessary to satisfy the standard of proof urged by the Appellant.[3] In one case, the applicant managed to flee with an extensive file documenting his activities to expose corruption at high levels in the government, which had resulted in his persecution by government officials. His activities had also received wide media coverage. In another, the applicant was a close relative of a prominent and widely published intellectual whose arrest and expulsion from Haiti received extensive media cov-

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[3] The applicants' names and other identifying data have been withheld to protect the individuals' privacy.

erage. In yet another, a prominent black South African applicant had received extensive press coverage in the United States and abroad as an outspoken critic of apartheid. Similarly, another applicant was prominent in the Salvadoran land reform program and was an outspoken critic of the violence, repression and corruption that occurred in the name of the program. He and the program received extensive media coverage following the murders of two American land reform consultants associated with the program.

In contrast to these prominent asylum seekers, the boat people, South African refugees fleeing racism or guerrilla war, or the other countless men, women and children forced to flee their homes, are

without documentary evidence of specific past persecution or of the threat of future persecution. Their cases are no less compelling, however, than those extraordinary asylum applications for which documentation can be produced. For that reason, the "well-founded fear" standard requires only that the applicant's fear be genuine and reasonable under the circumstances. See Helton, Immigration and Naturalization Service v. Stevic: Standards of Proof in Refugee Cases Involving Political Asylum and Withholding of Deportation, 87 W. Va. L. Rev. 787, 800-808 (1985).

By adopting a generous standard of proof, the Ninth Circuit has rightfully acknowledged the practical difficulties faced by

asylum-seekers in obtaining documentary evidence independent of their own testimony. See Cardoza-Fonseca, 767 F.2d at 1453. Under the Ninth Circuit's approach, "if documentary evidence is not available, the applicant's testimony will suffice if it is credible, persuasive, and refers to 'specific facts that give rise to an inference that the applicant has been or has a good reason to fear that he or she will be singled out for persecution on one of the specified grounds' listed in section 208(a)." Id. (quoting Carvajal-Munoz, 743 F.2d at 574).

Even before Congress enacted section 208(a) of the Refugee Act, the Board of Immigration Appeals recognized that an applicant's "own testimony may be the best -- in

fact the only -- evidence available" and applied a generous standard of proof in asylum claims. In re Sihasale, 11 I. & N. Dec. 759, 762 (BIA 1966) (asylum sought under predecessor of 8 U.S.C. § 1158(a), providing for conditional entry). See also In re Ugricic, 14 I. & N. Dec. 384, 385-86 (BIA 1972) (credible testimony could satisfy the fear of persecution standard under the predecessor of 8 U.S.C. § 1158(a), conditional entry).

The Office of the United Nations High Commissioner for Refugees has specifically addressed the inherent difficulties refugees face in proving asylum claims and suggests a generous approach to reviewing such claims in its Handbook on Procedures and Criteria for Deter-

mining Refugee Status Under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, paras. 196, 197 (1979) (the "Handbook"). The Handbook stresses the subjective "fear" component of the standard, id. at paras. 37-41, 45, 52, and suggests a liberal standard for the objective "well-founded" component. Id. at paras. 42, 43, 196, 197. According to the Handbook:

> 196. . . . cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. . . . and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should,

> unless there are good reasons to the contrary, be given the benefit of the doubt.
>
> 197. The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself.

Handbook, supra, at paras. 196, 197.[4] See also INS v. Stevic, 467

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[4] United States courts have viewed the Handbook as a valuable guide to the meaning of the Protocol. See Zavala-Bonilla v. INS, 730 F.2d 562, 567 n.7 (9th Cir. 1984); Stevic v. Sava, 678 F.2d 401, 406 (2d Cir. 1982), rev'd sub nom. INS v. Stevic, 467 U.S. 407 (1984); Hotel & Restaurant Employees Union, Local 25 v. Smith, 594 F. Supp. 502, 512 (D.D.C. 1984). The Board of Immigration Appeals also views the Handbook as a helpful guide in interpreting the Protocol. See In re Acosta, Int. Dec. No. 2986 (BIA Mar. 1, 1985); In re Frentescu, 18 I. & N. Dec. 244 (BIA 1982); In re Rodriguez-Palma, 17 I. & N. Dec. 465 (BIA 1980).

U.S. 407 (1984) (the Supreme Court distinguished the apparently more generous "well-founded fear of persecution" standard applicable in asylum cases from the seemingly more stringent "clear probability standard" applicable in withholding cases, id. at 425, 430, and suggested an asylum applicant need only show a "reasonable possibility," short of a probability, of persecution, id. at 425).

Prior to the enactment of the Refugee Act, Congress had noted its dissatisfaction with the failure of the Immigration and Naturalization Service to meet the United States' international obligation to grant asylum. See Admission of Refugees into the United States, II: Hearings Before the Subcomm. on

Immigration, Citizenship and International Law of the House Comm. on the Judiciary, 95th Cong., 1st & 2nd Sess. 15 (1978) (statement of Rep. Eilberg). See also Helton, Immigration and Naturalization Service v. Stevic: Standards of Proof in Refugee Cases Involving Political Asylum and Withholding of Deportation, 87 W. Va. L. Rev. 787, 795-98 (1985). The Court should affirm the Ninth Circuit's ruling rejecting the Immigration and Naturalization Service's most recent refusal to abide by the Refugee Act.

By declaring a generous standard of proof to be applicable in asylum cases, the inherent difficulties asylum-seekers face in demonstrating a "well-founded fear of persecution" will be ameliorated. A

generous standard for the examination of asylum claims will not only further the purpose and policy of the Refugee Act but will reflect "one of the oldest themes in America's history -- welcoming homeless refugees to our shores." S. Rep. No. 256, 96th Cong., 1st Sess. 1 (1979).

II.

The Jurisprudence of Other Countries Reflects a Generous Standard of Proof in Asylum Cases.

A. Sovereign State Practice Should Guide The Court's Interpretation of the Proper Standard of Proof.

To determine the standard of proof required to show refugee status under the Refugee Act, this Court should look to the laws and jurisprudence of other sovereign states for guidance. The Refugee Act must be interpreted consistently with the Protocol and Convention and international practice is instructive on the proper interpretation of those agreements. Moreover, this Court has, on several occasions in the past, taken international practice into account in interpreting laws.

As discussed above in Part I, Congress specifically intended that the United States statutes dealing with refugees and asylum, such as the Refugee Act, be interpreted and applied in a manner consistent with the Protocol. In addition to the intention of Congress, general principles of statutory interpretation require that this Court look to the Protocol and Convention in interpreting the Refugee Act. For over a century and a half, this Court has embraced the principle that, whenever possible, a domestic statute should be construed consistently with international law. Weinberger v. Rossi, 456 U.S. 25, 32 (1982); Lauritzen v. Larsen, 345 U.S. 571, 578-79 (1953); MacLeod v. United States, 229 U.S. 416, 434

(1913); Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); Restatement of Foreign Relations Law of the United States § 134 (Tent. Draft No. 6, 1985) [hereinafter cited as "Restatement"].

As a duly signed and ratified international agreement, the Protocol constitutes a binding rule of international law. Vienna Convention of the Law of Treaties, May 22, 1969, art. 26, U.N. Doc. A/CONF 39/27, reprinted in 8 I.L.M. 679 (1969) [hereinafter cited as "Vienna Convention"]; Restatement § 321. Therefore, in construing the Refugee Act, this Court should seek to harmonize the Refugee Act with the meaning of the Protocol and Convention. To do otherwise would be to

thwart the long-standing principle of interpreting United States laws in accordance with international law.

In determining the proper meaning to be ascribed to the Protocol (and therefore the Refugee Act), this Court should look to the practice of other sovereign parties to those agreements. It is an established canon of treaty interpretation that the subsequent practice of parties to a treaty should be taken into account. Vienna Convention, art. 32(3)(b); Restatement § 325(2). See also Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982); Day v. Trans World Airlines, 528 F.2d 31, 35-37 (2d Cir. 1975); Husserl v. Swiss Air Transport Co., 351 F. Supp 702, 707 n.6 (S.D.N.Y.

1972), aff'd, 485 F.2d 1240 (2d Cir. 1973). Subsequent practice constitutes strong evidence of what the goals and intentions of the parties were. Thus, in deciding how to interpret the Protocol and Convention, this Court should be guided by the interpretation given those agreements by other parties as evidenced by their laws and jurisprudence. In this regard, the practice of states with legal and political systems similiar to those of the United States is particularly persuasive.[5]

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[5] Even absent a specific treaty provision, the practice of other states is a useful guide in interpreting United States domestic laws. On several occasions, this Court has looked to the practice of other states for assistance in the interpretation of our own law. This approach
(Footnote continued)

In the area of refugee and asylum law, this Court has the benefit of the exemplary principles established by the practice of several other states with legal and political systems closely akin to those of the United States. In interpreting our own law, which embodies this nation's international

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has been particularly prevalent in the context of human rights. See, e.g., Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982) (examining practice of European and British Commonwealth states in determining whether Constitution prohibited death penalty for accomplice liability in felony murders); Coker v. Georgia, 433 U.S. 584, 569 n.10 (1977) (noting practice of other states in determining whether death penalty was unconstitutional punishment for rape); Trop v. Dulles, 346 U.S. 86, 102-103 (1958) (looking to practice of "civilized nations of the world" in determining whether denationalization was unconstitutional punishment).

treaty obligations, this Court should give great weight to the lesson offered by these other states.

B. Other Sovereign State Parties to the 1951 United Nations Convention relating to the Status of Refugees and the 1967 United Nations Protocol relating to the Status of Refugees Have Recognized the Need for a Liberal Standard of Proof.

In view of the inherent difficulties faced by asylum-seekers and the nature of the rights involved, other sovereign state parties to the Convention and the Protocol have recognized the need for a generous standard of proof in determining refugee status. A discussion

of relevant jurisprudence from these countries follows.[6]

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[6] Much of this jurisprudence was collected in connection with a meeting of North American and European asylum practitioners held under the auspices of the European Consultation on Refugees and Exiles in New York in May 1986. See "Liberal Trend on Political Asylum Discerned by Lawyers' Gathering," N.Y. Times, May 11, 1986, § 1, at 28. Canada and the United Kingdom were chosen for this discussion based on the similarity of their legal systems to that of the United States. The other countries discussed herein, France and the Netherlands, are those with a long history under the Convention and Protocol for which materials and translations were available. For the convenience of the Court, the foreign materials that are not readily available in law libraries have been assembled in an Addendum and lodged with the Clerk of the Court.

1. Canada. The Convention's definition of refugee status is incorporated into Canadian law in the Immigration Act of 1976 § 2 (hereinafter cited as the "Act"). Both to fulfill its obligations under the Convention as incorporated into domestic law and to assure protection of asylum applicants' fundamental constitutional rights, Canada has adopted generous procedural and substantive rules to effect a liberal interpretation of the Convention's definition of refugee.

The procedural rights of aliens seeking asylum in Canada have been clearly articulated and vigilantly enforced by Canadian courts. For example, the rules of evidence adopted by the Federal Court of Appeal provide that the Board of

Immigration Appeals (the "Board") must consider all of the evidence presented by the applicants, regardless of when the events occurred, Oyarzo v. Minister of Employment and Immigration, 2 Federal Court Reporter [F.C.] 779 (Can. F.C.A. 1982) (minimal political involvement many years earlier must be considered in evaluating foundation for present fear), and including evidence which would otherwise be hearsay. Re Saddo and Immigration Appeal Board, 126 D.L.R.3d 764 (Can. F.C.A. 1981) (newspaper articles submitted by applicant must be considered). Applicants must have an opportunity to respond to evidence which the Board relies on from its own knowledge. Permaul v. Minister of Employment and Immigration, 53 National Re-

porter [N.R.] 323 (Can. F.C.A. 1983); Galindo v. Minister of Employment and Immigration, 2 F.C. 781 (Can. F.C.A. 1981). Most significantly, the sworn testimony of an applicant carries a presumption of validity in the absence of evidence to doubt his credibility. Maldonado v. Minister of Employment and Immigration, 31 N.R. 34 (Can. F.C.A. 1979) (where applicant under oath alleged fear for his safety in Chile, the Board could not infer from the fact that he had returned to Chile from Argentina before seeking asylum in Canada that his allegations were not credible); Permaul, 53 N.R. at 324 (Board could not contradict applicant's sworn testimony based on its knowledge of conditions in Guyana). These rules

demonstrate that Canadian courts recognize the difficulty asylum applicants face in establishing their claims.

A recent decision of major importance, strengthening the procedural rights of asylum-seekers, is Singh v. Minister of Employment and Immigration, 58 N.R. 1 (Can. 1985), in which the Supreme Court of Canada invalidated certain appellate procedures of the Act to the extent that they conflicted with constitutional principles of procedural fairness. Id. at 74. At issue was Section 71 of the Act, which provides for redetermination of the Minister's asylum decision. The 1982 Supreme Court decision in Kwiatkowsky v. Minister of Manpower and Immigration, 45 N.R. 116 (Can. 1982), had adopted a harsh

construction of Section 71 of the Act, requiring the Board to provide a hearing for redetermination of refugee status only if it found that the applicant was more likely than not to establish refugee status. This deprived many applicants of the opportunity to reinforce their claim with oral argument.[7]

Striking down this restrictive screening process for hearings under Section 71, the Singh court initially determined that aliens applying for asylum are protected by Canada's constitutional law and basic principles of funda-

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[7] Section 45 of the Act provides for initial refugee determinations by the Minister of Employment and Immigration and does not require that the Minister hold hearings. Immigration Act 1976 § 45.

mental fairness. The court then applied these principles in the asylum context, noting that "[t]he most important factors in determining the procedural content of fundamental justice in a given case are the nature of the legal right at issue and the severity of the consequences to the individuals concerned." Singh, 58 N.R. at 14. Based on the importance of the rights and the potential severity of the consequences in asylum cases, the court concluded that Canada's constitutional law requires an oral hearing at some point in the asylum process.

The substantive standards under Canadian immigration law are similarly generous to asylum applicants. In Kwiatkowsky, the Supreme

Court defined a well-founded fear of persecution to require a subjective fear, which would be evaluated on the basis of objective evidence "to determine if there is a [reasonable] foundation for it." Kwiatkowsky, 45 N.R. at 122. The Federal Court of Appeal, in Arduengo v. Minister of Employment and Immigration, 40 N.R. 436 (Can. F.C.A. 1981), clarified that a well-founded fear of persecution does not require the applicant to show that he would be subject to persecution. The same court, in Rajudeen v. Minister of Employment and Immigration, 55 N.R. 129 (Can. F.C.A. 1984), applied a similar test to that in Kwiatkowsky, requiring no more than a "valid basis" for an applicant's subjective fear. Id. at 134. Finally, in determining

whether the basis for a fear of persecution is valid, the Board is required to view the applicant's activities as the feared government would, and not as the Board or the Canadian Government would. Astudillo v. Minister of Employment and Immigration, 31 N.R. 121 (Can. F.C.A. 1979) (membership in a sports club viewed by Chilean government as political).

The Canadian interpretation of the Convention's well-founded fear standard is thus far more generous to asylum applicants than a clear probability, or even a balance of probabilities standard.

2. The United Kingdom.

The United Kingdom has also incorporated the Convention's "well-founded fear of persecution" standard into its laws regarding political asylum and the determination of refugee status. Statement of Changes in Immigration Rules, House of Commons Papers No. 169, para. 134 (1983) (the "Immigration Rules").[8] Notwithstanding the narrow scope of judicial review of administrative

[8] As a procedural matter, British immigration officials are required to refer asylum applicants to the Secretary of State for the Home Office (the "Secretary"). Statement of Changes in Immigration Rules, House of Commons Papers No. 169, para. 73. The Secretary determines the refugee status of the applicants, subject to review by the Immigration Appeal Tribunal (the "Tribunal"). Decisions by the Tribunal are subject to review by the appellate courts.

decisions available in the United Kingdom, see Ex parte Bugdaycay, [1986] 1 W.L.R. 155 (C.A.), the appellate courts have adopted a generous interpretation of the Convention definition of political refugees and the well-founded fear standard.

In Woldu v. Secretary of State for the Home Department, Immigration Appeal Tribunal No. TH/93591/82 (2705), slip op., (1983), the Tribunal considered the application of an Ethiopian woman who, because of her membership in the Eritrean minority, was vulnerable to arbitrary arrest and persection during Ethiopia's civil war. In granting her claim of refugee status, the Tribunal held that "for a fear of persecution to be

well-founded, there must be a reasonably grounded expectation of persecution [which] must be higher than a mere remote possibility, but need not be higher than a probability, of persecution." Id. at 4 (emphasis added). The Tribunal then found that applicant's well-founded fear was established by the applicant's family connections with Eritrea, and the existing circumstances in Ethiopia, which would put her "at risk of arbitrary treatment" if she returned. Id. at 4-5.

Decisions of the Queen's Bench Division support the Tribunal's liberal interpretation of the well-founded fear standard. In Ex parte Jeyakumaran, CO/290/84 (Q.B. 1985) (available July 1, 1986, on LEXIS, Enggen library, Cases

file), where a member of the Tamil minority in Sri Lanka sought asylum, the Queen's Bench Division stated that the Immigration Rules require a two-tiered analysis: "subjectively, whether [the applicant] had a fear of the kind specified; and, objectively, whether it was well-founded." Id. The court recognized "the administrative problem of numbers seeking asylum," but refused "to adopt artificial and inhuman criteria in an attempt to solve it." Id. This Court should also reject such an attempt by the United States' administrative authorities to elevate the applicable standard of proof.

In Ex parte Jonah, CO/860/84 (Q.B. 1985) (available July 1, 1986, on LEXIS, Eggen library, Cases file), a former union leader from Ghana who had been forced to go into hiding in a remote village sought asylum. The Queen's Bench Division noted the distinction between proving a likelihood of persecution and proving that the applicant would be persecuted on the balance of probabilities. Citing Fernandez v. Government of Singapore, [1971] 1 W.L.R. 987 (H.L.),[9]

[9] In Fernandez, the House of Lords interpreted language in the Fugitive Offenders Act of 1967 similar to the well-founded fear standard to require a lesser degree of likelihood than a balance of probabilities test would imply. The Fugitive Offenders Act § 4(1) states that "A person shall not be returned . . . if it appears to the Secretary . . . that he might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race,

(Footnote continued)

the court pointed out the inappropriateness of the latter standard when a court is required to predict future events such as what would happen to an asylum applicant upon return to his or her home country.[10]

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religion, nationality or political opinions." The House of Lords placed great emphasis on the gravity of the harm likely to befall the applicant if the Secretary ruled erroneously against him. Recognizing the similarity of both the language and the nature and gravity of harm involved (i.e., loss of liberty) in the two cases, the Queen's Bench Division in Jonah, CO/860/84 (Q.B. 1985), relied on Fernandez to support its adoption of the more liberal test.

[10] The Queen's Bench in Jonah, CO/860/84 (Q.B. 1985), also set forth a more expansive definition of persecution than had the adjudicator below. Despite finding that the applicant, upon denial of refugee status, would be forced to live in a remote village of his country, separated from his wife and
(Footnote continued)

A clear probability standard would be similarly inappropriate, as it would require courts to predict whether applicants would be subject to persecution, rather than evaluate their present fears.

3. France. The liberal construction of the Convention terms is not limited to state parties which adhere to Anglo-American legal traditions. In France,[11] for exam-

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unable to continue in his occupation of 30 years, the adjudicator nevertheless held that the applicant was not facing persecution. The Queen's Bench applied what the court termed an "ordinary" meaning of persecution, i.e., "injurious action and oppression", and found that the applicant's situation was consistent with persecution in that expanded sense. Id.

[11] France recognizes as a refugee any person who falls within the mandate of the United Nations High Commissioner for Refugees
(Footnote continued)

ple, the office for the Protection of Refugees and Stateless Persons ("OFPRA") recognizes as refugees those who show that they fear persecution and that such fear is reasonable.[12] The Commission des Recours,

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or within Article 1 of the Convention. Law No. 52-893 of July 25, 1952, Article 2, Journal Officiel, July 27, 1952, 7642 (France). In addition, France has enacted the Protocol as domestic law. Decree No. 71-289 of Apr. 9, 1971, Journal Officiel, Apr. 18, 1971, 3752 (France). The discussion of French statute and case law herein is based on the excerpts of decisions appearing in F. Tiberghien, La Protection des Refugies en France (1984) (hereinafter cited as "Tiberghien").

12 France's Minister of External Relation explained OFPRA's interpretation of the Convention's refugee definition as follows:

> "... OFPRA evaluates an applicant's fear of persecution and bases its deci-
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> (Footnote continued)

the administrative tribunal which reviews the determinations of the OFPRA, has found that the grant of refugee status does not require actual proof of threatened persecu-

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> sion upon an examination of the situation in the asylum applicant's country of citizenship, its laws and their application, as well as upon principles enunciated in the various international agreements concerning the rights of man. Refugee status is based in each individual case upon a consideration of all the elements and all the circumstances which may shed light on a given situation and establish the credibility of the applicant's statements as received by the office. . . ."

Reply of the Minister of External Relations to a Parliamentary Question, No. 27217, Journel Officiel - Assemblee Nationale, June 9, 1980, 2342, cited in 26 Annuaire Francais de Droit International 954-55 (1980) (unofficial translation).

tion, but that the Commission des Recours may take notice of the general conditions in the country of origin, or other facts that are relevant to the determination of refugee status, to show a likelihood of persecution. Tiberghien, supra, at 194 (discussing Lopez Martinez, Comm. Rec. 530, Jan. 13, 1955).[13]

The decisions of the administering authorities and the appellate bodies in France are not based on the probability of persecution, but rather on a plausible account for fear of persecution.

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[13] The Commission des Recours has also adopted a liberal interpretation of the term "persecution." See Weisner, Comm.Rec. 9,129, Nov. 24, 1977, reprinted in part in Tiberghien, supra, at 130 (clearly disportionate criminal sanctions may be considered persecution).

Thus, in Hassam, Comm.Rec. 12,529, Apr. 23, 1981, discussed in Tiberghien, supra, at 194, the Commission held that an applicant who alleged, but did not substantiate, threats of persecution, had a "plausible reason" for a well-founded fear of persecution because of the then-occurring regional conflicts and his ethnic origins. Likewise, in Kouhem Helaleh, Comm.Rec. 14,243, June 7, 1982, discussed in Tiberghien, supra, at 194, the Commission found that, in view of the political regime in the country to which the applicant would be deported, the applicant, who had never resided in that country, could fear persecution solely on account of his Jewish faith. This generous standard of plausibility is more consis-

tent with the Convention's refugee definition than is a clear probability standard.

4. The Netherlands. In the Netherlands, reviewing courts do not hesitate to overturn decisions by the State Secretary on the question of refugee status[14] based on the liberal standard of plausibility and in consideration of the difficulties inherent in proving asylum

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[14] Although the State Secretary has substantial discretion in granting asylum where another safe country has evidenced some willingness to accept the applicant, Judgment of Oct. 1, 1980, Judicial Division of the Council of State, Neth., Nos. A-2.137-A & B, the higher courts in the Netherlands have granted refugee status liberally regardless of the State Secretary's determinations below.

cases.[15] For example, the Judicial Division of the Council of State (the "Division") has held that a protest singer from Uruguay had a well-founded fear of persecution, Judgment of July 12, 1978, Judicial Division of the Council of State, Neth., No. A-20107, and that a Mexican national validly feared persecution when Mexican authorities had taken action against demonstrations and peaceful political activity in which the applicant was involved. Judgment of Oct. 1, 1980, Judicial

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[15] See Judgment of Feb. 21, 1983, Judicial Division of the Council of State, Neth., Nos. A-2.0071-A & B (applicant must establish that persecution is plausible); Judgment of Jan. 14, 1982, Judicial Division of the Council of State, Neth., Nos. A-2.1795-A & B (facts must be established with sufficient plausibility).

Division of the Council of State, Neth., Nos. A-2.137-A & B. In two other cases, the Division found that a South African who was subject to apartheid and who had participated in some political activities was entitled to refugee status, Judgment of Apr. 6, 1981, Judicial Division of the Council of State, Neth., No. A-2.0932, and that a Hungarian national with knowledge of state secrets was likely to be subject to a disproportionately heavy sentence for leaving Hungary and was, therefore, entitled to asylum. Judgment of Feb. 21, 1983, Judicial Division of the Council of State, Neth., Nos. A-2.0071-A & B.

The Division presented an expansive view of persecution when it overturned the State Secretary's

denial of refugee status to an Argentinian who had been banned from practicing his religion, holding that "there is no evidence that the Divine Light Mission is proscribed in Argentina for reasons which are acceptable by international standards." Judgment of Sept. 30, 1982, Judicial Division of the Council of State, Neth., Nos. A-2.1234-A & B. In another case, the Division found that persecution for membership in a particular social group can include discrimination based on sexual disposition, but noted that such discrimination must "limit [the applicant's] means of subsistence to such an extent as to justify the term 'persecution.'" Judgment of Aug. 13, 1981, Judicial Division of the

Council of State, Neth., No. A-2.1113.

5. Summary. Canada, the United Kingdom, France and the Netherlands all evidence similar approaches to the determination of refugee status under the Convention. All four countries have recognized the necessity for a generous standard of proof because of the difficulties inherent in proving claims for asylum and the gravity and nature of the harm facing the applicants if their claims are wrongly determined. These considerations should also direct this Court to adopt a liberal construction of the Protocol and Convention, in consonance with the interpretations of other state parties.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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Respectfully submitted,

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